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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-802

ARTHUR J. LUCK AND GLENN A. HENRY,

Petitioners,

vs.

UNION OIL CO. OF CALIF.; MOBIL OIL CORP.; GULF OIL CORP.; TEXACO INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents in Opposition.

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Question Presented.

The opinion of the Court of Appeals for the Ninth Circuit holds that owners of private pleasure boats, which boats were not for hire and were used solely for recreational purpose, may not maintain a cause of action for alleged loss of use of said boats occasioned by an obstruction to navigation arising out of an oil spill. Thus, the question raised by the Petition is whether the opinion of the Court of Appeals is correct.

Statute Involved.

The provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, *et seq.*, which are set forth in the Petition at pages 3-4.

Statement of the Case.

The jurisdiction of the District Court was invoked pursuant to the Outer Continental Shelf Lands Act ("Lands Act") 43 U.S.C. § 1301, *et seq.*, because the actions arose out of the escape of oil near and under respondents' fixed drilling platform located on federal-leased lands on the Outer Continental Shelf of the United States. Numerous suits arising out of the oil spill were filed in or removed to the United States District Court for the Central District of California. A major class action was established and several other cases consolidated under a stipulation wherein the defendant oil companies agreed to pay to plaintiffs "all legally compensable damages arising from a legally cognizable injury caused by the occurrence . . ., provided, however, that payment assumed hereby will not exceed such amounts and such claims as said defendants or their contractors would be responsible for in a case of negligence." It was further agreed that the claims of the various claimants subject to the stipulation would be tried before three Special Masters appointed by the Court and that any settlements pertaining to such claims would be approved by said Special Masters.

One of the classes of persons claiming injury by reason of the oil spill consisted of owners of pleasure boats which were not for hire and were used solely for recreational boating. In order to resolve certain common questions of law and fact, seven claims designated as "test cases" were selected for trial. On the eve of

trial, a tentative settlement agreement was reached between counsel and the terms of that settlement were offered to all pleasure boat owner claimants (whose claims were in excess of $300.00) and were ultimately accepted by 108 of those claimants, including five of the seven "test case" claimants. The settlement was thereafter approved by the District Court on July 24, 1970. At the same time, the Court approved settlements which had been made earlier involving 131 additional pleasure boat owners whose claims were for less than $300.00. These settlements left unresolved the claims of but 24 pleasure boat owners or less than 10 percent of the original class of pleasure boat owners.

The two remaining test cases, those of petitioners herein, commenced to trial before the Special Masters sitting *en banc*. The Masters ruled that the law of admiralty applied to the obstruction to navigation complained of, and recommended that recovery for loss of use of a noncommercial nature be denied on the authority of *The Conqueror*, 166 U.S. 110 (1897). The Masters further recommended that damages for physical injury to plaintiffs' vessels be allowed and made findings as to the amount of such physical damages. Petitioners objected to the recommendations and findings of the Special Masters and upon full briefing and argument the trial court approved the Masters' report and entered judgment accordingly. Plaintiffs thereupon appealed from the judgment of the trial court insofar as it denied recovery of damage for the alleged noncommercial loss of the recreational use of their

pleasure craft occasioned solely by the obstruction to navigation caused by the presence of oil on navigable waters.

On appeal, the Ninth Circuit having the benefit of the intervening decisions of this Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and *Askew v. American Waterways Operators, Inc.*, 41 U.S.L.W. 4507 (1973) observed that substantive admiralty law does not automatically apply to all torts committed on the navigable waters and therefore did not necessarily oust the law of the State of California which would otherwise apply under the Outer Continental Shelf Lands Act. It therefore analyzed plaintiffs' claim under *both Federal maritime law and California law* and found that *neither* allowed recovery of the damages sought by plaintiffs. It thereupon affirmed the judgment of the District Court.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

I.

The Application of State Law Is an Independent Ground for the Opinion.

In the first of two arguments presented as reasons why this Court should grant a Writ of Certiorari, petitioners contend that State law not Federal maritime law applies to the obstruction to navigation occasioned by the oil spill. Although, as set forth below, (i) the Ninth Circuit properly interpreted *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969) in conjunction with *Executive Jet Aviation* and *Askew* in applying admiralty law to this case and (ii) no conflict exists between the decisions of the Fifth Circuit and Ninth Circuit interpreting the "Lands Act," the decision below also held that the damages sought by petitioners *are not recoverable under California law*. Petitioners do not suggest that the Ninth Circuit did not properly apply California law. Thus the correctness of that portion of the opinion is not in issue and because this independent state ground for the decision below is a sufficient basis in and of itself upon which to predicate the opinion, review by this Court is neither necessary or desirable.

II.

The Decision Below Is Clearly Correct.

The decision below is not inconsistent with the decisions of this Court. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969) and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) established the rule that as to injuries occurring on drilling platforms located on the Outer Continental Shelf of the United States,

State law is made applicable under the "Lands Act" as if it were the Federal law, and that admiralty law does not apply to such injuries. However, the present case does not involve an injury occurring on an offshore drilling platform but instead relates to injury caused by the obstruction of navigable waters by reason of the escape of oil from the ocean floor under and near a drilling platform. The Court of Appeals held that although this interference with navigation constituted a justiciable issue under both Federal maritime law *and* California law, both bodies of law do not permit recovery for the alleged damages sought by petitioners.

In reaching its opinion the Court of Appeals considered the recent decisions of this Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972) and *Askew v. American Waterways Operators, Inc.,* 41 U.S.L.W. 4507 (1973). The Court of Appeals found that the alleged loss of use of a pleasure vessel caused by an obstruction to navigation, had sufficient relationship to traditional maritime activities to allow the application of Federal maritime law under the doctrine of *Executive Jet Aviation, supra.* Under maritime law there can be no recovery for loss of recreational use of a vessel used strictly for personal pleasure. *The Conqueror,* 166 U.S. 110 (1897). The Court further stated that the recent decision of this Court in *Askew v. American Waterways Operators, Inc., supra,* does make it appropriate to consider whether the damages sought by petitioners were recoverable under the law of California. Upon such consideration the Court held that under California law the plaintiffs could not recover because the act complained of constituted a public nuisance and plaintiffs' loss of navigation rights

was an injury no different in kind from that suffered by the public generally. It concluded:

> "These plaintiffs were deprived of no more than their 'occasional piscatorial pleasure.' For this deprivation there is no recovery *either* under *California law or general maritime law.*"

III.

No Conflict Exists Between This Opinion and the Opinions of the Fifth Circuit Court of Appeals.

No conflict exists between the opinion below and the opinions of the Court of Appeals for the Fifth Circuit. In fact in reaching its decision that ". . . the Outer Continental Shelf Lands Act, as interpreted in *Rodrigue,* does not preclude the application of maritime law to claims with a maritime nexus wholly apart from the location of the platform on navigable waters," the Ninth Circuit specifically relied on the Fifth Circuit decision in *Kimble v. Noble Drilling Corp.,* 416 F.2d 847 (5th Cir., 1969) *cert. denied* 397 U.S. 918 (1970). The cases cited by petitioners in support of their contention that a conflict exists are inapposite to the facts of this case. *Bertrand v. Forest Corp.,* 441 F.2d 809 (5th Cir., 1971). (Wrongful death action where plaintiff's husband apparently fell to sea from offshore drilling platform held not maritime tort); *Peytavin v. Government Employees Insurance Co.,* 453 F.2d 1121 (5th Cir., 1972). (Injuries sustained in auto accident while on floating pontoon at ferry landing not properly within jurisdiction of admiralty). More on point is the decision of the District Court for the Southern District of Texas in *Armstrong v. Chambers & Kennedy,* 340 F. Supp. 1220 (S.D. Tex., 1972) which interpreted the decisions of this Court and of the

Fifth Circuit to apply Federal maritime law to injuries sustained to a vessel and its crew arising from an explosion on an offshore platform.

IV.
The Conqueror Should Not Be Overruled.

Concerning the holding of *The Conqueror,* 166 U.S. 110 (1897) that loss of use of a pleasure boat not used for hire is not compensable, the Ninth Circuit properly characterized the language in *Brooklyn Eastern District Terminal v. United States,* 287 U.S. 170 (1932) as dicta and disregarded *Finkel v. Challenger Marine Corp.,* 316 F. Supp. 549 (S.D. Fla., 1970) (wherein no appeal was taken to the Court of Appeals for the Fifth Circuit) as being contrary to the express holding of this Court in *The Conqueror.* Clearly the Fifth Circuit would not look favorably upon the District Court's disregard of the long-established rule that an award of damages for detention of a vessel must be founded on proof of actual loss of profits. As recently as May 17, 1973, Judge Wisdom speaking for the Court in *Skou v. United States,* 478 F.2d 343 (5th Cir., 1973) reiterated the rule and remanded that case to allow the plaintiff to present evidence of actual commercial loss. The reporters are replete with decisions like that of the Fifth Circuit following the rule of *The Conqueror.* See, *e.g., Crain Bros., Inc. v. Duquesne Slag Prod. Co.,* 273 F.2d 948 (3rd Cir., 1959); *Thompson v. United States,* 266 F.2d 852 (4th Cir., 1959); *Atchison T. & S.F. Ry. Co. v. California Sea Products Co.,* 51 F.2d 466 (9th Cir., 1931); *The Beaver,* 287 Fed. 679 (9th Cir., 1923); *The State of California,* 54 Fed. 404 (9th Cir., 1893); *Johnson's Branford Boatyard, Inc. v. Yacht Altair,* 260 F. Supp.

841 (D. Conn., 1966); *American-Hawaiian S. S. Co. v. The S. S. San Clemente*, 1943 A.M.C. 758 (N.D. Calif., 1943).

That the use of a pleasure boat may constitute imputed income under the Federal income tax laws, *Offshore Operations Trust v. Commissioner (Baird v. Commissioner)*, 32 CCH Tax Ct. Mem. ¶32,149 (M) (1973-212), has no relevance to whether a well-established rule of admiralty should be altered.

Traditionally, admiralty has limited tort recovery to cases involving commercial loss. Recent decisions of this Court have tended to more closely confine admiralty to its traditional sphere, allowing State law to assume concurrent jurisdiction in areas that will not run contrary to the general purposes of maritime law. Thus in *Askew v. American Waterways Operators, Inc.*, 41 U.S.L.W. 4507, 4511 (1973) this Court stated, quoting Chief Justice Hughes' opinion in *Just v. Chambers*, 312 U.S. 383 (1941):

> ". . . [T]he principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' "

See also *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971); *Rodrigue v. Aetna Cas-*

ualty and Surety Co., 395 U.S. 352 (1969). The loss of use of a pleasure craft in coastal waters by reason of oil pollution is an area in which the several states have an interest and the protection of that interest need not run counter to the purposes of maritime law. Thus, it is an area in which according to *Askew* the various states can exercise their jurisdiction and under the authority of *Askew*, California law may properly be applied to petitioners' claim. But under California law no recovery can be had. Thus there is no compelling reason to consider let alone overrule the long-established rule of maritime law enunciated in *The Conqueror* and thereby upset the uniform international and interstate maritime rule. As State and Federal law can be applied concurrently no reason exists to overrule the law so long applied to maritime affairs with respect to its harmony and uniformity in its international and interstate relations.

Conclusion.

The Petition shows no reason why the applied for Writ of Certiorari should be granted. We submit, for the reasons stated herein, that it should be denied.

Respectfully submitted,

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